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No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1961

UNION CARTAGE COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

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INDEX

	Page
Statement	1
Argument	2
Conclusion	5

CITATIONS

Cases:

Andrew G. Nelson, Inc. v. *United States*, 355 U.S. 554	3
Cantlay & Tanzola, Inc., Common Carrier Application, 10 M.C.C. 743	4
Dallas & Mavis Forwarding Co., Extension—Galion, Ohio, 72 M.C.C. 653	3
Dugan Extension of Operations—Nebraska Points, 26 M.C.C. 233	4
Hove Truck Line v. *Eldon Miller, Inc.*, 63 M.C.C. 753	3
Leaman Transportation Co., Contract Carrier Application, 34 M.C.C. 73	4
Minneapolis R.R. v. *Peoria Ry.*, 270 U.S. 580	5
Petroleum Carrier Corp. v. *Black*, 51 M.C.C. 717	3
Service Storage & Transfer Co. v. *Virginia*, 359 U.S. 171	3
United States v. *L. A. Tucker Truck Lines*, 344 U.S. 33	5

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on April 26, 1961, by a three-judge district court, convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought to set aside an order of the Interstate Commerce Commission. Appellant is a common carrier by motor vehicle authorized to transport "[c]ontractor's machinery and equipment,

heavy machinery, and commodities requiring the use of special equipment" (J.S. 1a). In a proceeding to determine the validity of rates proposed by appellant for the carriage of petroleum and petroleum products, the Commission held that the rates were "unlawful in that transportation thereunder would exceed [appellant's] operating authority" (J.S. 8a).

The Commission noted, and appellant concedes (J.S. 2a), that the language, "[c]ontractor's machinery and equipment, heavy machinery," in appellant's certificate of public convenience and necessity refers to the operation of a heavy hauler. The Commission further observed that carriers engaged in the hauling of heavy machinery must perform related services which often require the use of special equipment. It therefore held that the designation "commodities requiring the use of special equipment" does not confer additional transportation authority upon the appellant, but merely "defines the nature of the transportation service * * * of a heavy hauler" (J.S. 7a).

Applications for reconsideration were denied by the full Commission (J.S. 6), and the district court unanimously sustained the order (J.S. 1a–3a).

ARGUMENT

This appeal presents no substantial question requiring further review by this Court.

The sole question in this case involves interpretation of the language in a motor carrier certificate of public convenience and necessity. After full administrative proceedings, the Commission concluded that the phrase "commodities requiring the use of special

equipment" merely clarified the designation of a heavy hauler to which it was appended and did not grant any essentially different authority.

The interpretation of a certificate issued by the Commission is primarily a question for that agency (see *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171), and is "simply a definitive declaration of what rights existed from the very beginning under the permit" (*Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558–559, n.4). The Commission's interpretation is therefore usually sustained "unless found to be clearly erroneous" (*ibid.*). In the present case, the district court correctly held that the challenged order was neither "arbitrary" nor "capricious", and was well within the Commission's interpretative authority (J.S. 3a).

The Commission's interpretation of the authority granted by the certificate in the present case follows closely its earlier decision in *Petroleum Carrier Corp.* v. *Black*, 51 M.C.C. 717, in which the term "and commodities requiring special equipment" appended to language similarly defining a heavy hauler operation was held not to authorize the transportation of petroleum products in bulk in tank vehicles. Petitioner cites no case in which the phrase at issue, as used here, has been interpreted to authorize transportation of any goods not directly related to such normal heavy haulage services.[1]

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[1] Heavy haulers have often been referred to as carriers of "commodities requiring special equipment." See, *e.g.*, *Dallas & Mavis Forwarding Co., Extension—Galion, Ohio*, 72 M.C.C. 653, 656; *Hove Truck Line* v. *Eldon Miller, Inc.*, 63 M.C.C. 753, 756.

In a number of cases, the Commission has used the phrase "commodities requiring the use of special equipment," or its equivalent, to characterize the commodities specifically excluded from a certificate authorizing a carrier to engage in the transportation of general commodities. As so used, the term has been broadly interpreted to exclude carriage of such bulk commodities as petroleum or chemicals, which require special tank cars, as well as to exclude the types of goods carried by heavy haulers. But, as the court below pointed out (J.S. 2a), a given phrase often means one thing in an exclusionary context and quite another when used, as here, as a supplement to words defining a well recognized type of haulage to which the phrase can be related. Certainly there is nothing "clearly erroneous" in the Commission's view that the inclusion of the phrase in the certificate was not intended to give heavy haulers authority to transport an entirely different type of commodity utilizing a different type of equipment, which the Commission normally authorizes by language expressly referring to the use of tank cars for the transportation in bulk of petroleum or petroleum products. See, *e.g., Cantlay & Tanzola, Inc., Common Carrier Application,* 10 M.C.C. 743, 754; *Dugan Extension of Operations—Nebraska Points,* 26 M.C.C. 233; *Leaman Transportation Co., Contract Carrier Application,* 34 M.C.C. 73, 82.[2]

[2] Appellant also alleges that "[it] purchased the instant certificate in reliance upon * * * an informal opinion of the Interstate Commerce Commission" (J.S. 9) and implies that the Commission is bound thereby (J.S. 11). But this Court has long held that the Commission is not bound by the informal

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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opinions of its employees. *Minneapolis R.R.* v. *Peoria Ry.*, 270 U.S. 580, 585. In any event, this issue has been waived because it was not presented to the Commission in the petition for reconsideration. *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 36–38.

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